**Mental Illness and the Death Penalty**

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**Christopher Slobogin**

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University of Southern California Law School
Los Angeles, CA 90089-0071

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MENTAL ILLNESS AND THE DEATH PENALTY

Christopher Slobogin[*]

This essay outlines three reasons why the death penalty, even if generally a valid exercise of state authority, should never or rarely be imposed on those who are mentally ill. First, execution of those who suffer from mental illness violates equal protection of the laws in those states which prohibit execution of children (i.e., all states), or at least in those states which prohibit execution of people who are mentally retarded (of which there are a dozen). Second, given the robust research indicating that capital sentencing juries often treat mental illness as an aggravating circumstance, the bulk of death sentences imposed on mentally ill people are deprivations of life without due process of law. Third, most mentally ill people on death row should not be executed either because they are incompetent under *Ford v. Wainwright*, properly construed, or because their competence is maintained through an unconstitutional imposition of medication.

## Introduction

Our society has long been ambivalent about mental illness. On the one hand, for many laypeople mental illness is something to be feared. The medieval theory that mental disability is the product of possession by evil spirits finds its modern expression in the accepted wisdom that "crazy" people are very different from the rest of us and generally to be avoided.[1] At the same time, we have long pitied those who are afflicted by mental problems, as evidenced by the centuries-old existence of a special defense excusing such people from criminal responsibility,[2] as well as by the frequent campaigns to improve their treatment facilities.[3]

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[*]Stephen C. O'Connell Professor of Law, University of Florida Fredric G. Levin College of Law, Visiting Professor, University of Southern California Law School..

[1]*Compare* MICHAEL PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 38-39 (1994)(depicting medieval views) with Amerigo Farina et al., *Role of Stigma and Set in Interpersonal Interaction*, 71 J. ABNORMAL PSYCHOLOGY 421 (1966)(mentally ill persons described as less desirable friends and neighbors than criminals).

[2]*See generally* MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 190-93 (2d ed. 1997).

[3]These range from the crusades of Dorothea Dix in the late nineteenth century, see ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 125 (2d ed. 1949), to system-wide litigation championing treatment rights for people with mental illness. See Wyatt v. Stickney, 344 F.Supp. 373 (1972).

Nowhere is this ambivalence more dramatically exposed than in death penalty cases. Mental illness is expressly recognized as a mitigating factor in most death penalty statutes[4] and the Supreme Court has held, in *Ford v. Wainwright*,[5] that it is cruel and unusual punishment under the eighth amendment to execute a person whose mental state renders understanding of capital punishment impossible. Yet a significant proportion of death row inmates are mentally ill (even when mental illness is defined in the narrow sense adopted in this essay),[6] and the research evidence suggests that mental illness is often, in fact if not in law, an *aggravating* factor as far as capital sentencing bodies are concerned.[7]

This essay outlines three reasons why the death penalty, even if generally a valid exercise of state authority, should never or rarely be imposed on those who are mentally ill. The first argument is the most global: execution of those who suffer from mental illness violates equal protection of the laws in those states which prohibit execution of children (i.e., all states), or at least in those states which prohibit execution of people who are mentally retarded (of which there are a dozen). The second argument assumes that execution of people who are mentally ill is constitutional as a general proposition, but relies on the assertion made above that capital sentencing juries usually treat mental illness as an aggravating circumstance; on this assumption, the bulk of death sentences imposed on mentally ill people are deprivations of life without due process of law. The third argument assumes that a valid death sentence has been imposed, but shows why most mentally ill people on death row should not be executed either because they are incompetent under *Ford*, properly construed, or because their competence is maintained through an unconstitutional imposition of medication.

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[4]*See infra* text accompanying notes 55-61.

[5]477 U.S. 399 (1986).

[6]This essay will, in essence, define "mental illness" as psychosis. *See infra* Part I. A survey of 15 adult death row inmates found that 40% (six) were chronically psychotic (evidencing, e.g., loose, illogical thought processes, delusions and hallucinations). Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmanes in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986). A survey of 40% of the juvenile population on death row in the U.S. found that 50% (seven out of 14) suffered from psychosis. Dorothy O. Lewis, et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 585 (1988). According to one confidential source in the Florida Department of Corrections, as of December, 1999, approximately 5% of the 369 inmates on death row suffer from some sort of psychosis.

[7]*See infra* text accompanying notes 62-79.

I. Terminology

Before embarking on these arguments, "mental illness" must be defined. As used in this essay, the term is meant to refer primarily to the psychoses. This is the group of mental disorders that most prominently affect a person's ability to interpret reality, usually as a result of delusions, hallucinations, and tangential and confused thinking;[8] specific disorders that fall in this category are schizophrenia, bipolar disorders (manic-depressive psychosis), the delusional disorders, and some organic mental disorders.[9] Mental illness, so defined, should be distinguished from two other broad categories of mental disorder, personality disorders and mental retardation. Personality disorders, such as paranoid, schizotypal, antisocial, borderline, and intermittent explosive, are enduring patterns of perception and behavior that are maladaptive, but do not normally involve the significant cognitive distortions associated with the psychoses.[10] Mental retardation is principally associated with substandard intellectual functioning, with the threshold intelligence quotient officially set at 70.[11] In contrast, people who are psychotic or suffer from a personality disorder generally do not have significant intellectual deficits, although it is possible to have a "dual diagnosis" which involves both mental retardation and some other condition.[12]

These three categories--psychosis, personality disorder, and mental retardation--are useful constructs only to a point. Their boundaries are ill-defined and considerable overlap can exist. Furthermore, for legal purposes, the key concern is not the particular diagnosis but the specific type of impairment evidenced by the individual. A particularly important implication of these two observations is that some people with personality disorders, although not "mentally ill" as defined above, may exhibit impairment that is relevant in some of the legal settings discussed here. A few

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[8]Psychosis has been defined as "[a] severe mental disorder characterized by gross impairment in reality testing, typically shown by delusions, hallucinations, disorganized speech, or disorganized or catatonic behavior." AMERICAN PSYCHIATRIC ASSOCIATION , AMERICAN PSYCHIATRIC GLOSSARY 175 (7th ed. 1994).

[9]See generally, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 151-52 (dementia due to general medical conditions); 285-86 (schizophrenia); 301 (delusional disorder); 332 (manic disorder)(4th ed. 1994)(hereafter DSM-IV).

[10]*Id.* at 633 (general definition); 637-38 (paranoid); 645 (schizotypal); 649-50 (antisocial); 654 (borderline) & 611-12 (intermittent explosive).

[11]*Id*. at 46.

[12]One estimate is that roughly 30% of those who suffer from mental retardation also suffer from mental illness. FRANK MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977).

examples of this more expansive, legally contingent, definition of "mental illness" are provided below.[13]

## II. The Equal Protection Argument

After the Supreme Court's decisions in *Thompson v. Oklahoma*,[14] it is probably unconstitutional to execute anyone for a crime committed while under 16.[15] In any event, no state permits execution of such youth.[16] Twelve states and the federal government prohibit execution of people who are mentally retarded, an apparent trend;[17] as recently as 1993 only two states did so.[18] This type of prohibition, based on perceptions of culpability for the crime committed, exists independently of the eighth amendment bar, recognized in *Ford*, against executing a person who is "incompetent" at the appointed time of execution.

In sharp contrast to the immunity from execution granted children and people with mental retardation, no state prohibits execution of a person who was mentally ill at the time of the offense. The fourteenth amendment's injunction requiring equal protection under the law is violated by this difference in treatment because there is no good reason for it; although, as noted in Part I, there are psychological differences between people with mental retardation and people with mental illness, there are no significant, *legally* relevant differences between these two groups, or between them and children. Thus, a state that does not treat all three groups similarly in terms of eligibility for execution is acting unconstitutionally.

Defense of this assertion requires, first and foremost, dealing with the Supreme Court's decision in *Heller v. Doe*,[19] which suggested that the state does not *need* a good reason for

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[13]*See, e.g., infra* text note 47 and accompanying text and note 98.

[14]487 U.S. 815 (1988).

[15]Justice O'Connor, one of the five-member majority voting to prohibit such executions, rested her decision on the ground that offenders younger than 16 "may not be executed under the authority of a capital punishment statute that fails to specify a minimum age at which the commission of a capital crime can lead to the offender's execution." 487 U.S. at 857-58 (O'Connor, J., concurring). None do. 487 U.S. at 829.

[16]*Id.*

[17]Denis W. Keyes et al., *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 MENT. & PHYS. DIS. L. REP. 687 (1997).

[18]Jamie Marie Billotte, *Is It Justified?–The Death Penalty and Mental Retardation*, 8 NOTRE DAM J. L., ETHICS & PUB. POL. 333, 333-34 (1994).

[19]509 U.S. 312 (1993).

discriminating between people with mental illness and people with mental retardation. In *Heller*, a five-member majority of the Court held that the standard of proof and the procedures for commitment of people with mental retardation may differ from those associated with commitment of people with mental illness, so long as the state has a "rational basis" for the variations.[20] As the Court has made clear in other decisions, a rational basis exists when the state can advance a "reasonable identifiable governmental objective" for the alleged discrimination,[21] which generally means that any plausible reason will suffice.[22]

However, in the earlier decision of *City of Cleburne v. Cleburne Living Center*,[23] a unanimous Court suggested that something more than a rational basis is necessary to sustain legislation that disadvantages a mentally disabled group. *Cleburne* held unconstitutional application of an ordinance that barred from certain residential areas group homes for the "feeble-minded" (i.e., people with mental retardation), but permitted institutions such as boarding houses, fraternities and sororities, apartment hotels and nursing homes in the same areas.[24] Because the law's application was based on "irrational prejudice," in particular beliefs about the dangers posed by people with mental retardation,[25] the Court found it violated the Equal Protection Clause.[26] Although *Cleburne* avoided declaring that people with mental retardation are a suspect or quasi-suspect class for equal protection purposes,[27] the Court rarely grants relief to the plaintiffs in a case applying the rational basis test.[28] Accordingly, several commentators have labeled *Cleburne* a case which required something akin to "rational basis with bite" in cases involving mental

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[20]*Id*. at 22.

[21]Schweiker v. Wilson, 450 U.S. 221, 235 (1981).

[22]JOHN E. NOWAK & RONALD E. ROTUNDA, CONSTITUTIONAL LAW 601 (5th ed. 1995).

[23]473 U.S. 432 (1985).

[24]*Id*. at 450.

[25]Although the Court canvassed a number of reasons given by City for its decision, most boiled down to a fear of people with mental retardation, to which the Court responded, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id*. at 448.

[26]*Id*. at 450.

[27]*Id*. at 442-47.

[28]LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1443-46 (2d ed. 1988).

disability.[29] *Heller* did not directly undermine that precedent, despite its outcome, because the Court noted at the outset of that opinion that the argument for a higher level of review was not "properly presented" in that case.[30] The proper standard of review in cases involving alleged discrimination against those with mental disability is thus still unresolved.[31]

Of course, even if rationality review with bite is the proper standard for evaluating the death penalty as it applies to mental illness on the one hand and to youth and mental retardation on the other, good reasons for any differential treatment among these two groupings would defeat an equal protection challenge. Taking into consideration the retributive, deterrent and incapacitative purposes of the death penalty,[32] four candidates for such "good reasons" might be advanced. First, the state might claim that youth under 16 and those with mental retardation are easier to identify than those with mental illness. Age is usually verifiable as a matter of routine, and IQ scores are reliably obtained through scientifically normed intelligence tests; by comparison, it might be asserted, mental illness is relatively simple to malinger.[33] If so, the death penalty must be maintained for the latter group to deter fabrication. Second, whereas age and mental retardation are "irreversible" conditions, mental illness is more likely to be successfully

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[29] *Id.*; Gayle Wynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 793-99 (1987); WILLIAM B. LOCKHART ET AL, CONSTITUTIONAL LAW: CASES– COMMENTS –QUESTIONS 1161-62 (8th ed. 1996).

[30] 509 U.S. at 319.

[31] *Cf.* William M. Wilson, III, *Romer v. Evans: "Terminal Silliness," or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891, 1931 (1997)(describing how the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), striking down a Colorado constitutional provision that prohibited protective legislation for gays, "may have loaned *more* credence to a standard of review that it specifically disavowed in *Heller*"); Alfonso Madrid, *Comment–Rational Basis Review Goes Back to the Dentist's Chair: Can the Toothless Test of Heller v. Doe Keep Gays in the Military?*, 4 TEM. POL. & CIVIL RTS. L. REV. 167, 193 (1994)(distinguishing *Cleburne* from *Heller* in part because the facts of *Heller* "do not demonstrate the blatant discrimination that was apparent in *Cleburne*"). Note also that *Cleburne* cannot be distinguished from *Heller* on the ground that the latter case, like the context at issue here, involved discrimination between two mentally disabled groups; such a conclusion would be tantamount to saying race is not a suspect classification when the government discriminates between two minority races.

[32] Rehabilitation, often listed as the fourth purpose of punishment, obviously does not apply in this context.

[33] Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?"*, 29 ARIZ. L. REV. 1, 98 (1987)(the fear of successful deception by people with mental illness has "permeated the American legal system for over a century.").

"treated."[34] That should not allow the argument that execution of a mentally ill person can proceed once the mental symptoms are ameliorated (because a like argument would allow execution both of children once they reach 16 and some people with borderline mental retardation whose condition can be improved through habilitation). But it does suggest that people with mental illness, more so that youth or people with retardation, could have, and should have, done something about their condition prior to the crime.[35] A closely related argument is that people with mental illness, at least those who are adults, have had more of a chance to learn the mores of society than children or people with mental retardation.[36] In other words, even if they were mentally ill at the time of the offense through no "fault" of their own, they were not as mentally compromised as youth or people with mental retardation. Finally, perhaps people with mental illness are more dangerous than the other two groups.[37]

None of these arguments withstand the type of close analysis that *Cleburne* suggests is required, however. Although the point is debatable,[38] *Heller* itself assumed that mental

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[34]Psychotropic medication has been quite successful at eliminating psychotic symptomatology with a few weeks, whereas habilitation of people with mental retardation is a slow process. *Compare* HAROLD I. KAPLAN & BENJAMIN J. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 990 (6th ed. 1989)(response time to medication is four to five weeks) *with* AMERICAN PSYCHIATRIC PRESS, TEXTBOOK OF PSYCHIATRY 710-11 (John A. Talbott, et al. 1988)(discussing need for "long-term" programs).

[35]Research suggests that jurors consider the defendant's ability to obtain treatment relevant to the viability of an insanity defense. Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 L. & HUM. BEH. 447, 458 (1995).

[36]As to experts on people with mental retardation have stated, "the cardinal difference [between retardation and mental illness] is that . . . [m]entally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 432, 424 (1985). With children, it is the opportunity, rather than the ability, to learn that is diminished.

[37]That is certainly the public's perception. See, e.g., Bernice A. Pescosolido et al., *The Public's View of the Competence, Dangerosuness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM J. PUB. HEALTH 1339, 1341 (1999)(reporting that, while 17% of a random sample of citizens felt that the a "troubled person" was "very likely" or "somewhat likely" to be violent, 33.3% said the same of the depressed person, and 60% said the same of a person with schizophrenia).

[38]See DSM-IV, *supra* note 9, at 39-40 ("there is a measurement error of approximately 5 points in assessing IQ" and "impairments in adaptive functioning [a relatively amorphous

retardation is easier to diagnose than mental illness, in the course of explaining why Kentucky could permit commitment of those with retardation on a lower standard of proof than it required for commitment of those with mental illness.[39] While that assumption might justify a state's decision to establish differing levels of proof, it does not explain why people who clearly *do* have the latter diagnosis are more deserving of the death penalty than people with mental retardation. The correct response to the difficulty-of-diagnosis observation is not to permit execution of people with mental illness, but to place a higher burden on the party alleging that condition (as the state law involved in *Heller* did).[40] The slightly different concern that mental illness is more easily malingered can be addressed the same way, although the evidence suggests that serious mental illness is very difficult to fake in any event.[41]

The allegations that people with mental illness are more likely to be at fault for their condition at the time of the offense and have greater opportunities than children or people with mental retardation to learn right from wrong more directly address the relative culpability and deterrability issues that should be the focus of equal protection analysis. The problem is that these assertions about enhanced culpability of people with mental illness are just as speculative as the City of Cleburne's claims that people with mental retardation are more dangerous than other, non-disabled groups. Although it might be said that, in some cases, people with mental illness are on notice that a failure to seek or maintain treatment might result in crime,[42] the same is true of those

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construct], rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation.").

[39]509 U.S. at 322.

[40]For a related argument, see John J. Gruttadaurio, *Consistency in the Application of the Death Penalty to Juveniles and the Mentally Impaired: A Suggested Legislative Approach*, 58 U. CINN. L.REV. 211, 236 (1989).

[41]Professor Perlin asserts that "there is virtually no evidence that feigned insanity has ever been a remotely significant problem of criminal procedure, even after more `liberal' substantive insanity tests were adopted. A survey of the case law reveals no more than a handful of cases in which a defendant free of mental disorder `bamboozled' a court or jury into a spurious insanity acquittal." PERLIN, *supra* note 1, at 238. He also notes that research on malingering among offenders indicates that most inmates feign *sanity*, not insanity, *id*. at 240-42 & n.48, and that advances in detection of malingering can discern faking in over 90% of the cases when it does occur. *Id*. at 239-40.

[42]David Wexler, *Inducing Therapeutic Compliance through the Criminal Law*, 14 L. & PSYCHOLOGY REV. 43, 50-52 (1990)(discussing hypothetically the scenario in which a person with mental illness engages in "reckless endangerment" by refusing medication that will curb dangerous propensities). In the analogous situation involving lack of mens rea due to substance abuse, the law has traditionally permitted a defense for first degree murder, although if a person

with mental retardation and children; many people in the former group know they have a disorder and deny it rather than seek help,[43] while children who commit violent crime have generally been given several opportunities to obtain treatment through previous involvement in the juvenile justice system.[44] And while it cannot be denied that, developmentally, mentally ill adults are, as a class, more advanced than individuals in the other two groups, it is just as certain that people proven to be psychotic at the time of the offense are as volitionally and cognitively impaired at that crucial moment as children and people with mental retardation who commit crimes. If anything, the delusions, command hallucinations, and disoriented thought process of those who are mentally ill represent greater dysfunction than that experienced by most "mildly" retarded individuals (defined as having an IQ of between 55 and 70[45]) and by virtually any non-mentally ill teenager.[46] Even certain types of personality disorders, among them paranoid personality and

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drinks (or fails to seek medication) with the purpose of making crime easier, then such culpability might be present. *See generally*, Paul Robinson, *Causing the Condition of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985). See also, Robert Pear, *Few Seek to Treat Mental Disorders, a U.S. Study Says*, N.Y TIMES, Dec. 13, 1999 at A1 (study shows that most people with mental disorder never seek treatment because they "do not realize that effective treatments exist, . . . they fear discrimination because of the stigma attached to mental illness [or they] cannot afford treatment because they lack insurance that would cover it.").

[43]Ellis & Luckasson, *supra* note 36, at 430 & 439 ("Many mentally retarded individuals expend considerable energy attempting to avoid this stigma," even though "proper teaching can equip most retarded persons to tailor their actions to social expectations").

[44]HOWARD N. SNYDER & M. SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (1999)(40% of males with a violent career and 34% of females come into contact with the justice system prior to age 13).

[45]DSM-IV, *supra* note 9, at 40.

[46]A person with schizophrenia has at least two of the following five symptoms: delusions (fixed false beliefs); hallucinations; disorganized speech (e.g., frequent derailment or incoherence); grossly disorganized or catatonic behavior; or "negative symptoms", i.e., affective flattening (emotionlessness), alogia (a high degree of speechlessness) or avolition (lack of objectives). DSM-IV, *supra* note 9, at 285. A person with "mild" mental retardation, although less developed intellectually, is "educable", "develops social and communication skills during preschool years," has "minimal impairment in sensorimotor areas," acquires academic skills up to approximately the sixth-grade level by the late teens, and "by the adult years usually achieves social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress." *Id*. at 41. Both groups obviously fall short in terms of capabilities when compared to normal teenagers (13 and over), and even to many pre-teens.

borderline personality, can be associated with gross impairment that equals or exceeds the level of impairment normally present in these other subgroups.[47]

One could respond to these points by noting that sentencing traditionally has looked not just at culpability for a particular offense but at the overall character of the offender.[48] In this sense, it might be argued, youth and people with mental retardation, because of their pervasive, "congenital" deficits, are less blameworthy than people with mental illness. Yet the underlying assumption that a propensity for mental illness can somehow be avoided is, once again, false. The evidence is strong that both psychoses and personality disorders are either biological or developmental in origin.[49]

The claim that offenders with mental illness are more likely to commit other violent crimes is also easily debunked. Although the most recent research on the topic shows that the base rate for violence among the most severely ill is slightly more elevated than that of the general population,[50] mentally ill *offenders* (the group of interest in the death penalty context) are *less*

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[47]*Id*. at 637 (one symptom of paranoid personality disorder: "reads hidden demeaning or threatening meanings into benign remarks or events") & 654 (a symptom of borderline personality disorder can be "transient, stress-related paranoid ideation or severe dissociative symptoms").

[48]*Cf*. Woodson v. North Carolina, 428 U.S. 280, 304 (1976)("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

[49]For a recent summary of research showing the genetic component of mental illness, see Eric Kandel, *A New Intellectual Framework for Psychiatry*, 155 AM. J. PSYCHIATRY 457, 460 (1998)(stating, *inter alia*, that "one component contributing to the development of major mental illnesses is genetic."). *See also*, DSM-IV, *supra* note 9, at 629 ("A Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.")

[50]See RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 653-55 (3d ed. 1999)(summarizing studies). The following is a fair statement of the research findings: "Although there appears to be an increased risk [of violence] in schizophrenia, particularly in paranoid schizophrenia, it must be reiterated that only a small minority of patients in this category are violent, and that the disorder itself is rarely sufficient to account for violent acts in instances where they occur." RONALD BLACKBURN, THE PSYCHOLOGY OF CRIMINAL CONDUCT: THEORY , RESEARCH AND PRACTICE 274 (1993)

likely to commit further crime than non-disordered offenders.[51] More importantly for purposes of the equal protection issue being addressed here, the base rate for violence among those with mental illness is no greater than the violence base rate for those with mental retardation and is much *lower* than the violence base rate for youthful offenders.[52]

One suspects that what lays behind the special treatment of those with mental illness in the death penalty context is the same type of "irrational prejudice" against which the *Cleburne* Court inveighed. People with mental illness are not viewed with as much empathy because they are perceived as even more different from us than people with mental retardation, and certainly more different from us than children. But, as *Cleburne* made clear, that difference, even if it truly exists, cannot form the basis for discriminatory treatment unless it threatens legitimate government interests.[53]

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[51]James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOLOGICAL BULL. 123 (1998); Marnie Rice & Grant Harris, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOLOGY, PUB. POL. & L. 126 1, 32 (1997)("[W]hen compared with other criminal or psychiatric patients, there is evidence that those who have a major mental illness may be less likely to commit another criminal or violent offense upon release.").

[52]Compare *supra* notes 46 & 47 with Ellis & Luckasson, *supra* note 36 ("The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole."); EMILY F. REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 17 (1993)(describing data showing a link between mental retardation and crime) and SNYDER & SICKMUND, *supra* note 42, at 62 (nationally, juveniles committed 27% of violent victimizations). Virtually all of serious crimes committed by juveniles were by juveniles between the ages of 10 and 18, *id*. at 54 & 13, a group which comprises only 12% of the population. STATISTICAL ABSTRACTS OF THE UNITED STATES 16 (1998) (table showing that ages 10 through 17 constituted 32.64 million out of a total 267.637 million).

[53]"It is true . . . that the mentally retarded as a group are indeed different from others not sharing their misfortune . . But this difference is largely irrelevant unless [they] threaten legitimate interests of the city . . . ." 473 U.S. at 448.

II. The Due Process Argument

Due process of law is clearly lacking when the state fails to follow its own statutory provisions.[54] If, contrary to the law in every death penalty state, mental illness is treated, consciously or unconsciously, as an aggravating factor in the death sentence determination, a flagrant due process violation has occurred. For reasons developed below, acceptance of this proposition could be the basis for a prohibition on all death sentences for those who are mentally ill; at the least, it would invalidate many of them.

Every state death penalty statute, either explicitly or implicitly, stipulates that mental illness at the time of the offense be considered as a possible mitigating circumstance.[55] That position is constitutionally required, in light of *Lockett v. Ohio*.[56] There the Supreme Court stated that "the eighth and 14th amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[57]

Roughly two-thirds of state capital sentencing statutes explicitly incorporate one or more of the mitigating factors found in the Model Penal Code,[58] which lists, *inter alia*: (1) whether the defendant was suffering from "extreme mental or emotional disturbance" at the time of the offense: (2) whether "the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct."[59] The first factor mimics the Code's provocation formulation for reducing murder to

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[54]"[With respect to] the nature of the `process' that is `due', [i]n all instances the state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken." NOWAK & ROTUNDA, *supra* note 22, at 511.

[55]See Ellen Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 292, 296-98 (1989).

[56]438 U.S. 586 (1978).

[57]*Id*. at 604 (emphasis in original). See also, Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding that trial court's refusal to consider an offender's emotional problems violated the eighth and fourteenth amendments).

[58]Berkman, *supra* note 55, at 297.

[59]See AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 210.6(4).

manslaughter, minus the reasonableness requirement.[60] The second factor uses the Code's insanity defense language, but with both the mental disease or defect predicate and the requirement that the incapacity be "significant" deleted.[61] The third factor invites a completely subjective analysis of the offender's motivations. In short, the mitigating impact afforded mental dysfunction under death penalty statutes is wide open, not even requiring a showing of mental illness as defined in this essay.

Yet research on the behavior of capital sentencing bodies strongly suggests that judges and juries often treat evidence of mental illness in precisely the opposite manner. One early study in California, which examined 238 capital cases to determine the factors that influenced decisions about capital punishment, found that unsuccessfully raising an insanity defense (a scenario which describes a significant portion of those defendants who use mental illness as a mitigator at the sentencing phase[62]) correlates *positively* with a death sentence.[63] A similar study of 128 cases in Georgia also found a powerful correlation between unsuccessful assertion of an insanity defense and a death sentence;[64] indeed, a failed insanity defense was one of the most accurate predictors of who would receive the death penalty, ahead of such variables as prior record and commission of another crime at the time of the homicide, and behind only the number of official aggravating factors proven at sentencing.[65]

Research focused on factors explicitly involved at sentencing also indicates that mental illness plays an an aggravating role at sentencing. Professor Baldus and his colleagues looked at

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[60]Compare *id*. at § 210.3(1)(b).

[61]Compare *id*. at § 4.01(1).

[62]Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 332 (1983)("much of the defense evidence which would be presented at the guilt phase, such as evidence of diminished capacity or insanity, also may be presented at the penalty phase in mitigation.").

[63]Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STANFORD L. REV. 1296 (1969).

[64]DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 644, 645 (1990)(two tables, each looking at 15 factors but using different statistical models, showing that assertion of a defense of "insanity or delusional compulsion" correlated with a death sentence at an extremely high level of statistical significance; $p \geq .0000$).

[65]*Id*. *See also id.* at 640-41 (table showing almost 50 factors, with assertion of an insanity defense show a correlation coefficient below only number of aggravating factors; scientific evidence other than ballistics or medical evidence involved; kidnapping involved; or killing motivated by desire to avoid arrest).

175 capital cases in Pennsylvania in an effort to determine how various statutory aggravating and mitigating factors influenced the factfinder's decision.[66] Based on their regression analysis, the 11 aggravating and 8 mitigating factors they studied all correlated with the sentence imposed in the predictable direction, with one exception: "extreme mental or emotional disturbance" correlated *positively* with a death sentence, albeit at a level on the verge of statistical insignificance.[67] A similar study found even stronger evidence of such a correlation, concluding that "[a] defendant's odds of receiving a death sentence increased significantly when the defendant had a history of childhood abuse, drug abuse and/or addiction, and mental and/or emotional disturbance."[68]

A fifth study, using mock jurors, may provide an explanation for these results. In speculating as to why he found that mental illness defenses were "so ineffective" in capital cases, the author of the study noted that the jurors endorsed some of the same spurious reasons already discussed: "mental illness is no excuse; he might have fooled the psychiatrist; he should have sought help for his problems."[69] Similarly, a sixth study found that, as compared to mock jurors who expressed scruples about the death penalty and therefore could be removed from a capital sentencing jury,[70] mock jurors qualified to serve on capital sentencing juries under the Court's caselaw are much more hostile to defendants suffering from schizophrenia (but react to defendants with mental retardation in roughly the same fashion as scrupled jurors).[71] Again, the subjects' explanation for this stance, according to the authors of this study, is that mental state arguments by people with mental illness are "a ruse and impediment to the conviction of criminals."[72]

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[66]David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688-89 (1998)(Table 6).

[67]*Id*. at 1689. The factor was significant at the .10 level; social science convention is to accord statistical significance only to factors that reach the .05 level. See JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 78 (1994).

[68]Julie Goetz & Gordon P. Waldo, *Why Jurors in Florida Vote for Life or Death: The Florida Component of the Capital Jury Project*, presented at the conference on Life Over Death XV, Ft. Lauderdale, Fl., September 27, 1996, at 34.

[69]Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & HUM. BEH. 113, 125 (1987).

[70]Wainright v. Witt, 469 U.S. 412 (1985).

[71]Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 L. & HUM. BEH. 81 (1984).

[72]*Id*. at 90.

Professor Garvey's research based on data gathered as part of the mammoth Capital Jury Sentencing Project provides another explanation for the hostility toward offenders who are mentally ill.[73] Based on interviews with 187 jurors who served on 53 capital cases tried in South Carolina between 1988 and 1997, Garvey found that jurors were "more likely to have found the defendant frightening to be near" when the killing was the "work of a madman" or the defendant was "vicious like a mad animal."[74] Regression analysis revealed that, of the eight emotions studied in this research (including sympathy, anger, and disgust), only "fear" of the defendant correlated significantly with the final vote on sentence.[75] To the extent mental illness is equated with "madness", then, Garvey's findings provide further support for the proposition that mental illness damages, rather than supports, the defendant's case at sentencing.[76]

Related to this last observation are two other sets of empirical results. Probably the most robust finding in research on why juries impose the death penalty is that perceived dangerousness plays a very significant role in the decision, even in those jurisdictions in which dangerousness is not recognized as a statutory aggravating factor.[77] In research about attitudes toward people with mental illness, a similarly robust finding is that laypeople view such people as abnormally

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[73]Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, **75** N.Y.U. L.REV. **26** (2000).

[74]*Id.* at **61 & 59** (tbls. 9 & 8).

[75]*Id.* at **6-61** (text accompanying notes 25 & 26).

[76]Consistent with the lay distinctions discussed in Part II, Garvey also found that, while jurors were "more likely to have felt sympathy or pity for the defendant" both when a defendant was mentally retarded and when he was "emotionally unstable or disturbed," they were more likely to be simultaneously "disgusted or repulsed" only by the latter type of defendant. *Id.* at **56** (tbl. 7).

[77]Several researchers with the Capital Jury Sentencing Project, which involved interviewing people who sat on capital juries, have observed that dangerousness is the paramount concern of most capital sentencing jurors regardless of their jurisdiction's law on the matter. *See, e.g.*, Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1131-33 (1995); Joseph L. Hoffmann, *Where's the Buck?–Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1153 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1178-79 (1995)(tbls. 5, 6); Marla Sandys, *Cross-Overs–Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. J. 1183, 1199-1200, 1216-17 (1995). *See also*, William J. Bowers, *The Capital Jury Project: Rationale, Deign, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 (1995)(tbl. 7)(32% of capital-sentencing jurors accept the clearly erroneous premise that the death penalty *must* be imposed if the defendant is dangerous).

dangerous.[78] Combining these two lines of research, it is hard to escape the conclusion that mental illness often plays an aggravating role in jury and judge decisions about whom to sentence to death.[79]

One might respond to this conclusion by noting that no death penalty statute explicitly prohibits use of mental illness as an aggravator. But permitting such use may well be unconstitutional. In *Zant v. Stephens*[80] the Supreme Court stated that it would be constitutionally impermissible to give aggravating effect to factors such as "race, religion or political affiliation or . . . conduct that actually should militate in favor of a lesser penalty, *such as perhaps the defendant's mental illness"*.[81] Although this statement was dictum and somewhat tentatively phrased, it reflects the well-accepted principle that mental illness diminishes culpability.[82]

Indeed, other courts have gone one step further, holding that even a legitimate aggravating circumstance may not form the basis for a death sentence if it was "caused" by mental illness. In

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[78]See Bruce Link & Ann Stueve, *New Evidence on the Violence Risk Posed by People with Mental Illness*, 55 ARCH. GEN. PSYCHIATRY 403 (1998)("There is a widespread belief among the American public that people with mental illness pose a significant violence risk [and] the prevalence of this belief seems to have increased since the 1950s . . . . To date, nearly every modern study indicates that public fears are way out of proportion to the empirical reality."); John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511, 511 (1992)(discussing, inter alia, how public fears about the purported link between mental illness and dangerousness "drive the formal laws and policies governing mental disability jurisprudence"); Gregory Leong et al., *Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?* 36 J. FORENS. SCI. 210, 215 (1991); Pescosolido et al., *supra* note 37, at 1343 ("After control for the nature of the problem and evaluation of case severity, respondents reported . . . increased expectations of violence if they labeled the vignette person as having a mental illness.").

[79]*Cf*. Lawrence T. White, *The Mental Illness Defense in the Capital Murder Hearing*, 5 BEH. SCI. & L. 411, 419 (1987)(concluding that research suggests that the reason mental illness defenses at the capital sentencing phase are ineffective is because, *inter alia*, the evidence leads the jurors to believe the defendant has a high probability of future dangerousness).

[80]462 U.S. 862 (1983).

[81]*Id*. at 885 (emphasis added).

[82]See James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 791-806 (1978)(describing the prevalent mitigating role that mental disorder has played in the law of capital punishment).

*Huckaby v. State*,[83] for instance, the Florida Supreme Court reversed a death sentence because the most significant aggravating circumstance–the heinousness of the offender's crime–was "the direct consequence of his mental illness."[84] Two years later, in *Miller v. State*,[85] the same court reversed a death sentence imposed by a judge who justified his decision on the ground that the defendant was dangerous as a result of his mental illness. The court noted that dangerousness was not recognized as an aggravating factor in Florida's death penalty statute and went on to state that "[t]he trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute."[86]

Carried to its logical end, these cases would make imposition of the death penalty on a mentally ill person extremely difficult, since many aggravating circumstances can often be traced to the person's mental condition. That outcome would also bring a helpful practical advantage. No longer would defense attorneys be put to the Hobson's choice of whether to present evidence of mental illness and risk proving the prosecution's case in aggravation or instead refrain from presenting such evidence when it may be the only "mitigating" evidence available (thereby risking a later ineffective assistance of counsel claim as well).[87]

Although these arguments are substantial, two counterarguments suggest that due process does not require a *complete* ban on death sentences for those with mental illness. First, one might make a distinction between situations where the mitigating and aggravating circumstances both go to culpability (as in *Huckaby*), and where the aggravating circumstance goes to something else (as in *Miller*). While a (mitigating) finding of extreme mental or emotional stress is hard to square with a finding that the killing was heinous (which Webster's defines as "hatefully or shockingly evil"[88]), it is not necessarily inconsistent to find that a person's mental illness makes him less blameworthy but more dangerous.[89] Second, the potential for improper use of mental illness is

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[83]343 So.2d 29 (Fla. 1977).

[84]*Id.* at 34.

[85]373 So.2d 882 (Fla. 1979).

[86]*Id.* at 885.

[87]See Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L.REV. 317, 333, 340-41 (1981).

[88]WEBSTER'S NEW COLLEGIATE DICTIONARY (1998).

[89]*Cf.* Penry v. Lynaugh, 492 U.S. 302, 323-24 (1989); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). Of interest on this score, however, is that *Zant* cited *Miller* in the course of its suggestion that mental illness could not be used as an aggravating circumstance. 462 U.S. at 885.

presumably not realized in every case. After all, many mentally ill capital defendants are not sentenced to death, which suggests that evidence of a defendant's mental illness is not always the cause of those death sentences that are imposed.

As a way of dealing with these various concerns, the following proposal, which builds on one made by Ellen Berkman,[90] should be considered as a way of providing due process of law to mentally ill capital defendants. The defendant would be required to raise a reasonable doubt that, but for evidence of mental illness, a particular aggravating circumstance would not have been found. It would then be up to the prosecution either to show beyond a reasonable doubt that mental illness is unrelated to that factor or to convince the court that the aggravator may justifiably be the consequence of mental illness. Although this proposal does not completely remove the defense attorney's dilemma described above, it will give the attorney some idea of when evidence of mental illness can be used to best advantage, especially after appellate courts clarify which, if any, aggravating circumstances may be based on mental illness.

## IV. The Eighth Amendment Argument

*Ford v. Wainright's* holding that the eighth amendment bars execution of a person who is incompetent left two significant questions unanswered: What is the rationale for the competency requirement, and what is the content of the competency standard? The response to the first question determines the answer to the second. If, as this essay argues, the most plausible basis for the competency requirement is society's interest in retribution, then the standard defining competency to be executed is not as low a threshold as many have suggested, and a significant number of mentally ill people on death row today do not meet it.

In the course of its opinion in *Ford*, the Supreme Court noted at least six reasons, all of them derived from common law stretching back to medieval times, as to why a person must be competent prior to execution: (1) an incompetent person might be unable to provide counsel with last minute information leading to vacation of the sentence: (2) madness is punishment enough in itself; (3) an incompetent person cannot make peace with God; (4) execution of an incompetent person has no deterrent effect on the population; (5) such execution "is a miserable spectacle . . . of extream inhumanity and cruelty" (quoting Coke[91]); and (6) the retribution or vengeance meant

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Furthermore, several states do not permit dangerousness to be considered as an aggravating factor. Christopher Slobogin, *Should Juries and the Death Penalty Mix?* 70 IND. L.J. 1249, 1264 n. 56 (1995). In those states, the argument can be made that, given the strong tendency to think of people with mental illness as dangerous, any death sentence imposed on such people is likely to be illegitimate.

[90] See Berkman, *supra* note 55, at 305-08.

[91] 3 E. Coke, Institutes 6 (6th ed. 1680).

to be realized by execution cannot be exacted from an incompetent person.[92] The Court avoided settling on any one of these as the principal or only basis for its decision, simply stating that "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment [which bans cruel and unusual punishment]."[93]

The majority opinion was even less forthcoming on the competency standard. Indeed, it did not proffer any test. However, Justice Powell, in concurrence, stated that he "would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[94]

Because only the retributive rationale makes sense in modern times, Justice Powell's test is the correct one, provided the key word "unaware" in his test is defined to mean a lack of emotional appreciation. The flaws in the other rationales for the competency requirement have been well discussed by others,[95] and will only be hinted at here. For instance, as Justice Powell noted in his concurrence, the view that competency is required to assist the attorney "has slight merit today," because defendants are entitled to effective assistance of counsel at trial and appeal, as well as to multiple post-conviction reviews of the sentence.[96] Even if a lifetime of madness could be seen as sufficient punishment for first degree murder, the advent of psychotropic drugs means that most mentally ill people will not suffer indeterminately. Ensuring competency to allow making peace with God assumes both a religious offender (much less likely today than in medieval times) and that it is one's mental state at the time of execution, rather than the tenor of one's life, that is important in Heaven. Assuming executions have *any* deterrent effect,[97] attempting to distinguish in deterrence terms executions of people with mental illness from other types of

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[92] 477 U.S. at 406-11.

[93] *Id.* at 410.

[94] *Id.* at 422.

[95] *See, e.g.*, Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 48-57 (1986).

[96] 477 U.S. at 420.

[97] For a skeptical assessment of the death penalty's deterrent value, based on an analysis of the data up to that time, *see* NATIONAL ACADEMY OF SCIENCE, PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978).

executions is problematic; indeed, if the state were to execute even those who are psychotic, deterrence might be enhanced, because the populace would be assured of the state's resolve to kill and because potential criminals who bank on their ability to malinger illness will be faced with the most powerful dissuasion. And while execution of a person who is unaware that the event is taking place is undoubtedly cruel, it is at least as cruel to execute someone who knows he is about to be killed. The feeling of discomfort that one might experience observing execution of an insensate person is best explained as stemming from an unwillingness to exact punishment on someone who does not understand why it is happening–a retributive rationale. Commentators who have closely analyzed the various possible reasons for the competency requirement agree that society's interest in ensuring the offender suffers in proportion to his crime is the most solid traditional basis for the competency requirement.[98]

As harsh as this rationale sounds, it necessitates a definition of execution incompetency that is relatively broad. Mere understanding of the death penalty and why it is being imposed should be insufficient for a retributivist. Rather, the offender must fathom, if not internalize, the nature of the debt that he owes society; as one court put it, an incompetency finding is mandated if the offender, "[when] taken to the electric chair, . . . would not quail or take account of its significance."[99]

That this standard has teeth is demonstrated by the case of Horace Kelly, recently found competent by a California jury. The jury found that Kelly was able to describe both the consequence of the death penalty (death) and why he deserved it (he killed two woman and an 11 year-old boy).[100] Thus he met the austere version of Justice Powell's test. But under a

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[98]See Hazard & Louisell, *supra* note 95, at 387; Ward, *supra* note 95, at 56 (This article also puts forward a "nontraditional", "tacit clemency" rationale to the effect that the competency requirement is an indication of our ambivalence toward the death penalty. *Id*. at 56) . *See also* Michael Radelet & George Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 39 (1986)("the exemption [of the incompetent] can be understood if . . . the primary goal of capital punishment is retribution."); .

[99]Musselwhite v. State, 60 So.2d 807, 809 (Miss. 1952). Professor Ward objects that this standard "would automatically exempt sociopaths from execution as well as inhumanely require the obliteration of psychological coping mechanisms." Ward, *supra* note 89, at 68. While the standard might mandate an incompetency finding for some people with antisocial personality disorder (the modern version of sociopathy), it does not require remorse or fear (feelings this type of person often lacks), only an appreciation of the penalty. And, if one agrees with the argument made below that people may not be forcibly restored to competency, "coping mechanisms" will be rendered irrelevant, although "obliterating" them is arguably no more inhumane than executing someone who has no such mechanisms.

[100]Bob Egelko, *Federal Court Blocks Killer's Execution: New Hearing Ordered on Right to Appeal*, Orange County Press, June 10, 1998, at A04 (Marin County Superior Court jury

competency standard properly informed by the retributive premise, he should not have been found competent to be executed. The evidence indicated that Kelly, who was both mentally retarded and mentally ill, talked in rambling and incoherent sentences, thought that his mother would eventually take him home after one of her visits, and from time to time believed prison was a college.[101] Kelly had a shallow cognitive understanding of his legal situation, but comprehended neither the enormity of his punishment or the societal condemnation associated with it.

For some people with symptoms like those experienced by Kelly, antipsychotic medication can remove delusions and other mental symptoms that cause the incompetency. At issue in *Perry v. Louisiana*[102] was whether the state may forcibly medicate such individuals when necessary to ensure that *Ford's* test is met. The Supreme Court granted certiorari in the case, but then remanded it in light of its intervening decision in *Washington v. Harper*,[103] which allows forcible medication when "medically appropriate" for prisoners who are dangerous to self or others, or are gravely disabled. Somewhat surprisingly, given the *Harper* decision and its own earlier rulings, the Louisiana Supreme Court held on remand that forcible medication to render a person competent to be executed is impermissible.[104] The court relied primarily on state constitutional bases for its decision. Its principal holding was that medicating an objecting individual to facilitate execution constituted cruel and unusual punishment under Louisiana's constitution because it "imposes significantly more indignity, pain and suffering than ordinarily is necessary for the mere extinguishment of life, . . . because it imposes a severe penalty without furthering any of the valid social goals of punishment, and . . . because it subjects to the death penalty a class of offenders that has been exempt therefrom for centuries and adds novel burdens to the punishment of the insane which will not be suffered by sane capital offenders."[105]

There are several reasons why the U.S. Supreme Court may ultimately reject this reasoning. It could easily find, for instance, that the state's interests in meting out a justly

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approved Kelly's execution on a 9-3 vote, finding that he was aware he was about to be executed and why).

[101]Victoria Slind-Flor, *Is Convict Sane Enough to Execute?* The National Law Journal, April 20, 1998, at A8 (col. 1). *See also*, *Death Row Inmate Horace Kelly Gets Go-Ahead for New Hearing,* The San Francisco Chronicle, June 27, 1998 at A24.

[102]498 U.S. 1075 (1991).

[103]494 U.S. 210 (1990).

[104]State v. Perry, 610 So.2d 746 (La. 1992).

[105]*Id.* at 761. The court also based its decision on Louisiana's privacy provision, *id*. at 755-61, and, as discussed below, the notion that forcible medication in this context violates professional ethical constraints.

imposed sentence and deterring malingering outweigh the extra indignity forcible medication visits on the mentally ill offender.[106] Moreover, offenders who refuse medication, on their own or through their attorneys, probably do so primarily to avoid execution (rather than, for instance, out of a desire to avoid the side effects of medication); if so, the individual interest to be balanced against the state's is entitled to virtually no weight. Finally, and most importantly, if the basis for the competency requirement is society's interest in retribution, the individual's interests should count for little or nothing in any event.

It is the societal underpinning of the incompetency requirement, however, that provides the basis for a much more persuasive reason the Louisiana Supreme Court gave to bolster its decision in *Perry*. Playing off *Harper's* mandate that forcible medication be "medically appropriate",[107] the Louisiana court concluded that medication given "to facilitate . . . execution does not constitute medical treatment but is antithetical to the basic principles of the healing arts."[108] Given the clear ethical stipulation in medicine that doctors should do no harm,[109] and the relevant professional organizations' interpretation of that stipulation to mean that doctors may not "participate" or "assist" in executions,[110] involvement of mental health professionals in the forcible

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[106]Virtually every court which has considered the matter allows forcible medication of criminal defendants to restore their competency to stand trial. MICHAEL PERLIN, MENTAL DISABILITY LAW § 14.09 (1989 & 1997 supp). *Cf.* Riggins v. Nevada, 504 U.S. 127 (1992) (holding that the state may not *over*medicate a criminal defendant in its attempts to restore competency to stand trial, but refusing to address whether appropriately titrated medication may be forced on an incompetent defendant).

[107]610 So.2d at 754.

[108]*Id.* at 751. The Court also noted: "[T]he forcible medication of a prisoner merely to improve his mental comprehension as a means of rendering him competent for execution actually prevents the prisoner from receiving adequate medical treatment for his mental illness." *Id.* at 752. *See also*, David L. Katz, *Perry v. Louisiana: Medical Ethics on Death Row--Is Judicial Intervention Warranted?*, 4 GEO. J. LEG. ETHICS 707 (1991).

[109]This maxim comes from the Hippocratic Oath, which has been called "the most important rule in practice" from the perspective of the doctor-patient relationship. V. TAHKA, THE PATIENT-DOCTOR RELATIONSHIP 38 (1984).

[110]The American Medical Association has stated that a "physician . . . should not be a participant in a legally authorized execution," *Capital Punishment*, PROC. HOUSE DELEGATES AMA 85, 86 (1980), and the American Psychiatric Association has similarly stated that "[a] psychiatrist should not be a participant in a legally authorized execution." AMERICAN PSYCHIATRIC ASSOCIATION, THE PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY at § 1(4) (1985)(applicable to all members of the APA). The National Medical Association Section on Psychiatry and

administration of drugs is impermissible; as Professor Bonnie has pointed out, the clinician who restores a prisoner's competency "would be serving a role that is ethically indistinguishable from the physician who administers the lethal injection of barbiturates."[111] The fact that the party who is the focus of this argument is someone other the offender does not prevent state coercion of treatment from being a cruel and unusual method of exacting vengeance; again, that standard is not defined solely in terms of the offender's interests but rather takes into account overarching societal mores.[112]

The doctor-patient relationship is an intimate one. Asking a mental health professional to treat a person for the sole purpose of assuring a death sentence is carried out is akin to asking the offender's attorney or relative to assist in his execution. When faced with an incompetent capital offender who requires professional treatment to be restored, the state's only option should be commutation of sentence.[113]

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Behavioral Sciences (NMA) takes the position that doctors should treat condemned mentally ill people, but "under no circumstances directly or indirectly assist in an execution of a `death row' inmate." NMA, *Position Statement on the Role of the Psychiatrists in Evaluating and Treating Death Row Inmates*, at 5. *See also*, Kirk Heilbrun et al., *The Debate on Treating Individuals Incompetent for Execution*, 149 AM. J. PSYCHIATRY 596, 604 (1992)(carefully canvassing ethical arguments and concluding that "[i]t appears unethical to administer against the prisoner's wishes treatment that is highly relevant to competency, such as antipsychotic medication for psychotic disorders.")

[111]This line of reasoning could extend to other types of professional involvement in capital cases, such as testimony and evaluation. However, these latter roles merely provide the state with information relevant to the decision to execute, whereas "the express purpose of competency treatment is to guarantee that the patient will be killed. Each treatment strategy to heal the inmate is in fact another strategy to ensure his death." Rochelle Graff Salguero, *Medical Ethics and Competency to be Executed*, 96 YALE L.J. 167, 178-79 (1986). This reasoning might also bar treatment even of the consenting offender; here, however, both ethical rules and the doctrine of informed consent may requires the doctor to follow the wishes of the autonomous patient. *See generally*, Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEH. 67, 81-82 (1990); Heilbrun et al., *supra* note 110, at 601.

[112]See Trop v. Dulles, 356 U.S. 86, 100-101 (1958)("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[113]Maryland commutes the incompetent person's death sentence to a life sentence without parole, Md. Ann. Code art. 27 § 75A(d)(3), although it is unclear whether a person who can be

## Conclusion

Most mentally ill people who are convicted on capital charges should not be executed, for one of three reasons. First, such executions would violate equal protection of the laws in any jurisdiction in which execution of children and people with mental retardation is barred. Second, many death sentences imposed on people with mental illness violate due process because their mental illness is treated by the factfinder as an aggravating factor, either directly or to bolster a separate aggravating circumstance. Third, many mentally ill offenders who are sentenced to death will be so impaired at the time of execution that they do not emotionally appreciate the significance of their punishment and thus cannot be executed under the eighth amendment; this is so even if they are restorable through treatment, given the unethical and medically inappropriate role in which such treatment casts mental health professionals.

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restored to competency is considered incompetent under the statute. See *Perry*, 610 So.2d 770-71. *Cf*. Michael Radelet & George W. Barnard, *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 Bull. Am. Acad. Psychiatry & L. 297 (1988) (recounting professionals' ethical difficulties in dealing with the treatment issue and concluding that commutation is the only solution).